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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>WILLIE NUNNERY,<br><br>Defendant and Appellant. | 2d Crim. No. B208398<br>(Super. Ct. No. BA304841)<br>(Super. Ct. No. BA303882)<br>(Los Angeles County) |

Willie Nunnery appeals from the judgment entered after a jury convicted him in case number 304841 of possession of a firearm by a felon (count 7; § 12021, subd. (a)(1)) and two counts of making criminal threats (counts 5 and 6; Pen. Code, § 422) with firearm and gang enhancements (§§ 12022.5, subd. (a); 186.22, subd. (b)(1)(A)).[1] In a bifurcated proceeding, the trial found that appellant had suffered two prior strike convictions (§§ 667, subds. (b) – (i); 1170.12, subds. (a) – (d)), two prior serious felony convictions (§ 667, subd. (a)(1)), and had served five prior prison terms (§ 667.5, subd. (b)). Appellant was sentenced under the Three Strikes law to 50 years to life state prison. (§§ 667, subd. (e)(2)(A)(iii); 1170.12, subd. (c)(2)(A)(iii).) The trial court

[1] Case number 304841 was consolidated for trial with a second case (case number 303882) in which the jury found appellant not guilty of attempted murder of Clifford Owens and Shawshona Monge (§§ 664/187, subd. a)) and not guilty of possession of a firearm by a felon (§ 12021, subd. (a)(1)). .

sentenced appellant to an indeterminate term of 26 years to life on count 5 (making criminal threats), plus a determinate term of 24 years based on the 10-year criminal street gang enhancement, two five-year serious felony conviction enhancements, and a four-year firearm enhancement. (See *People v. Dotson* (1997) 16 Cal.4th 547, 550-551.) Identical concurrent sentences (i.e., 50 years to life) were imposed on count 6 and 7 and stayed pursuant to section 654.

We affirm the judgment of conviction but remand for resentencing on count 7 (felon in possession of firearm) because the trial court imposed a firearm enhancement (§ 12022.5, subd. (a)) that was not pled or found true by the jury.

*Facts and Procedural Histoy*

On the afternoon of June 22, 2006, Los Angeles Police Department Officers Craig Piantanida, Matthew Killman, and Patrick Aluotto stopped at a traffic light in an unmarked Jetta at Adams and Western Boulevard in Los Angeles. The officers were working undercover, in plain clothes, in an area controlled by the Rollin 20's criminal street gang.

Appellant drove up in a Mercedes, stopped in back of the Jetta, and "threw" gang signs at the officers. Appellant shouted "Fuck Barlems," a derogatory reference to the Rollin 30's Harlem Crips street gang. Officer Piantanida warned Officers Killman and Aluotto that appellant was "throwing signs" and "banging" them.

Appellant reached down to his waistband and stepped out of the Mercedes displaying a silver handgun. In a loud angry voice, appellant shouted "'I'm going to shoot you," or "I'm going to cap your ass," or "I'm going to blast your ass."

The officers thought they were about to be shot, yelled "Police" and exited the Jetta with weapons drawn.

Appellant threw the handgun into the Mercedes and ran southbound on Adams. As Officer Piantanida chased appellant, a black male got out the back of the Mercedes and ran. Officers Aluotto and Killman pursued but were unable to apprehend appellant's cohort.

The police seized a stainless steel nine millimeter semi-automatic handgun was on the Mercedes floorboard. The handgun was loaded with a round in the chamber and ten rounds in the magazine. The officers put appellant in the Jetta and called for backup. Appellant said that he belonged to the Rollin 20's gang and that his moniker was "Tex." Appellant claimed that a rival gang drove by earlier that day in a Jetta and were "banging on him and his homies."

Officer Mauricio Bautista, a gang expert, testified that the Rollins 20's is an organized street gang that commits homicides, aggravated assaults, robberies, and engages in narcotics trafficking. The Rollin 30's Harlem Crips is a rival street gang.

Bautista testified that appellant was a member of the Rollins 20's, was known as "Tex," and had gang tattoos. The officer opined that the death threat was revenge-related because the Rollins 20's had been challenged by a rival gang earlier that day. Officer Bautista stated that "I'm going to cap your ass" was a gang death threat and that the Rollin 20's will hunt and track down the victim after making such a threat. "[T]hey will follow them out to positions of their liking, away from witnesses, and they will conduct these crimes. They will throw up the hand signs to let you know what they think of the rival gang, and they will let them know exactly what they're doing before they do it, so there's no questions, there's no ambiguity. What they're going to do is harm you. They're going to kill you."

At trial, appellant claimed that he was working for a gang intervention unit to stop gang violence. After he pulled up behind the Jetta, the traffic light changed and other motorists honked. Appellant signaled for the Jetta to go through the light but the driver stuck his hand out and "flicked everybody off." Appellant claimed that the driver jumped out with a handgun and approached. Fearing for his life, appellant got out of the Mercedes and ran.

Appellant denied that he threatened the occupants in the Jetta, that he assaulted them with a handgun, or that he currently belonged to the Rollin 20's. Appellant denied changing his appearance but admitted that he had a new tattoo placed

over his Rollin 20's tattoo while in jail. Photos were received into evidence that appellant had grown a beard. Appellant claimed that he was housed at the Twin Towers jail facility and not provided a razor to shave.

Los Angeles Deputy Sheriff Scott Barnes, a supervisor at the Twin Towers facility, was called in rebuttal. Deputy Barnes testified that appellant had access to a razor every day unless the facility was locked down and inmates not allowed to shower.

Appellant filed a *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531), which granted limited discovery of the officers' personnel files, and called John Michael King-Smith as a *Pitchess* witness. King-Smith claimed that Officers Piantanida, Killman, and Aluotto stopped him for driving a rental car with an expired license registration tag. The officers accused him of being a gang banger and arrested him after medical marijuana was found in the car. King-Smith said that he was in held in custody for seven days before the criminal case was dismissed. When asked to describe the race of the officers, King-Smith stated they were Hispanic, Asian, and Caucasian. It was uncontroverted that Officers Piantanida, Killman, and Aluotto are Caucasian.

*Sufficiency of the Evidence*

Appellant argues that the evidence does not support the conviction for making criminal threats to Officers Killman and Aluotto. (Counts 5-6.) In a sufficiency of the evidence appeal, we consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier of fact could reasonably deduce from the evidence in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We may not substitute our judgment for that of the jury, reweigh the evidence, or reevaluate the credibility of witnesses. (*Ibid.*)

Among other things, section 422 requires that the prosecution prove that the threat "actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety'. . . ." (*People v. Toledo* (2001) 26 Cal.4th 221, 226.) "Sustained fear" is fear "that extends beyond what is momentary, fleeting or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

Although Officers Killman and Aluotto thought they were about to be shot, appellant claims there was no "sustained fear" because they were trained officers and fear is an inherent part of their job. The argument assumes that a peace officer cannot be the victim of a criminal threat, but the cases are to the contrary. (See *People v. Mosley* (2007) 155 Cal.App.4th 313, 323-326 [deputies in high security module placed in sustained fear by inmate's threats]; *People v. Schnathorst* (2004) 120 Cal.App.4th 1310, 1316 [no merit to contention that § 422 was not intended to protect peace officers]; *People v. Leopolo* (1997) 55 Cal.App.4th 85, 89 [officer threatened with a machete].)

Here the death threat caused the officers grave fear. Appellant stopped in back of the officers, made hostile and derogatory gang threats, and approached the Jetta with a loaded firearm in his hand. The officers were blocked by traffic and could not escape. Brandishing a loaded semi-automatic firearm, appellant yelled that he was going to "blast," "shoot," or "cap" them. Officers Killman and Aluotto saw and heard the death threat and believed it was a "death trap." Officer Piantanida did not hear appellant but was "terrified."

Appellant argues that it was unreasonable for the jury to conclude that that death threat caused sustained fear because he was captured seconds later. We disagree. Appellant fled and tossed the handgun into the Mercedes where the cohort was hiding. When Officers Aluotto and Killman saw the cohort, they feared they were about to be the victims of "a double driveby" shooting. The cohort jumped from the Mercedes and ran up an alley before Officers Aluotto and Killman could catch him. The officers returned to the Jetta, fearing that the cohort was waiting for them in the alley.

After appellant was captured, the officers called for backup, supporting the inference that they still feared for their safety. (See e.g, *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1538 [fear demonstrated by victim's police call].) Because of the location (20 blocks from the police station) and heavy traffic, it took five minutes for backup officers to arrive.

There was nothing "fleeting" or "transitory" about the officers' fear. The cohort was still at large and possibly armed. The officers had to stay with appellant until he was driven in the Jetta to the police station more than 30 minutes later. Officer Killman testified, "I have been working streets long enough to know that cops get shot in the back of the head every day so, of course, I was in fear." The officer spoke from experience. He had been shot at twice before by gang members and was "gang banged" 10 to 15 times working undercover.

Officer Aluotto feared that they would be shot because it was the Rollin 20's gang area and they had been mistaken as rival gang members. In 2004, Officer Aluotto was shot at driving away from a group that mistook him for a gang member. Here the death threat was explicit and unequivocal. Brandishing a loaded firearm, appellant said that he was going to "cap" them. Appellant was caught but the cohort was still at large, causing the officers to believe it was part of a planned attack to commit a double driveby shooting.

Criminal threats are judged in their context. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137.) Where the victim takes affirmative steps to end the threat, despite great fear of imminent injury, it does not render the victim's fear momentary, fleeting, or transitory. (See e.g., *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) Based on the totality of the circumstances, the evidence supported the finding that appellant made an explicit death threat which caused the officers to be in sustained fear for their safety.

*Pitchess Motion*

Pursuant to *Pitchess v. Superior Court, supra,*11 Cal.3d 531, appellant sought discovery of the officer's personnel records. The trial court conducted an in camera review of the records, determined that some records were discoverable, and ordered the information turned over to defense counsel.

At appellant's request, we have reviewed the sealed transcript of the *Pitchess* proceeding and conclude that the trial court did not abuse its discretion in

finding that certain documents in the personnel files were not discoverable. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Mooc* (2001) 26 Cal.4th 1216, 1232.)

*Count 7: Firearm Enhancement*

Appellant contends, and the Attorney General agrees, that the trial court erred in imposing a four year firearm enhancement on count 7 (felon in possession of firearm) to calculate the 26 year to life indeterminate term and a 24 year consecutive determinate term. (See *People v. Dotson, supra,* 16 Cal.4th at p. 559-560 [Three Strikes law permits use of enhancement to calculate both the indeterminate term and the separate determinate term].) The firearm enhancement was not pled or considered by the jury in convicting appellant on count 7. (§ 1170.1, subd. (e); *People v. Godwin* (1966) 50 Cal.App.4th 1562, 1572, fn. 4.)

The Attorney General argues that the firearm enhancement should be stricken and the matter remanded for resentencing on count 7. We agree. Five prior prison term enhancements (§ 667.5, subd. (b)) where found to be true but not considered at sentencing. "[T]he three strikes law expressly subjects a defendant to a separate determinate term for enhancements, even when those enhancements are used in calculating the minimum indeterminate life term." (*People v. Dotson, supra,* 16 Cal.4th at p. 560.) If the trial court intended to strike the prior prison term enhancements, it must state its reasons for doing so. (§ 1385, subd. (a); *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561.)

Appellant, in his reply brief, argues that four of the prior prison terms were served concurrently and count as only one prior prison term enhancement. (See § 667.5, subd. (g); *People v. Riel* (2000) 22 Cal.4th 1153, 1203; *People v. Ruiz* (1996) 44 Cal.App.4th 1653, 1669-1670.) Appellant further argues that the fifth prior prison term enhancement (Case No. RCR 20662) should be stricken because it is based on a felony strike prior which was used to impose a five-year enhancement pursuant to section 667, subdivision (a). (See *People v. Jones* (1993) 5 Cal.4th 1142, 1550; *People v. Garcia,*

*supra,* 167 Cal.App.4th at p. 1562.) This is a matter for the trial court to decide on resentencing.

We reverse and remand for resentencing on count 7 (felon in possession of firearm). The trial court is directed to strike the firearm enhancement on count 7 and to impose a new sentence that does not exceed the original sentence of 50 years to life. (See e.g., *People v. Castaneda* (1999) 75 Cal.App.4th 611, 614.) The judgment of conviction is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Drew E. Edwards, Judge

Superior Court County of Los Angeles

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Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

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